Supreme Court of the United States

OCTOBER TERM, 1943.

No. 700.

NORMAN G. BAKER, PETITIONER,

VS.

WALTER A. HUNTER, WARDEN, UNITED STATES PENITENTIARY, LEAVENWORTH, KANSAS, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT, AND SUPPORTING BRIEF.

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Index to Petition for Certiorari

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT, AND SUPPORTING BRIEF.

To the Honorable Chief Justice, and to the Associate Justices of the Supreme Court of the United States:

I. SUMMARY STATEMENT OF MATTERS INVOLVED.

This case challenges the validity of Rule 5 of the rules adopted by the Supreme Court as the rules of practice and procedure in all proceedings in criminal cases after verdict of guilty (7 F. C. A., p. 431).

Petitioner has been illegally imprisoned since February 23, 1943. To avoid further illegal imprisonment, this case is brought to this Court under Sec. 347 of Title 28, F. C. A., **before decision** of the case by the Circuit Court of Appeals from the Tenth Circuit in which it is pending on appeal from the United States District Court for the District of Kansas.

Action for release on habeas corpus was brought in said District Court on or about July 30, 1943, alleging that Petitioner was wrongfully imprisoned by the Warden of the United States Penitentiary at Leavenworth after having legally completed on February 23, 1943, the service of the sentence for which he was committed.

Hearing was delayed by the regrettable death of Judge Hopkins, and on October 19, 1943, Judge Huxman, sitting as the District Court of Kansas, heard the case and entered judgment discharging the writ and refusing relief to Petitioner (Rec. 21). On December 1, 1943, Petitioner perfected his appeal to the United States Circuit Court of Appeals for the Tenth Circuit (Rec. 21).

The case apparently cannot be reached before the May, 1944, Term of the Tenth Circuit Court of Appeals. To await the decision of that court before issuing certiorari would render the remedy by certiorari of no value.

The validity of Rule V of the rules for criminal cases after verdict is questioned, and should be passed upon by this Court which made the rules.

The gist of the question is whether Petitioner, whose service of sentence to four years imprisonment in the penitentiary, was commenced on January 25, 1940, by imprisonment without his request or consent, in a county jail to which he had been delivered by the marshal **to await transportation to the penitentiary,** and where he was so imprisoned for one year and two months, can law-

fully be imprisoned in the penitentiary four more years after affirmance of the judgment on appeal. Petitioner asks to have applied upon his sentence the year and two months service of sentence in county jails while awaiting transportation to the penitentiary.

The case necessitates clarification of the hazy line between substantive and procedural law and the determination whether Rule V of the said rules is void as substantive or is merely procedural and valid, also whether it is void because not authorized by Sec. 688 of Title 18, F. C. A. It involves the applicability of Sections 1 and 8 of Article I of the Constitution to Rule V and necessitates construction and interpretation of Sections 688 and 709a of Title 18 of the United States Code.

The controversy is one of law only. There is no dispute as to the facts. They are alleged in the petition (Rec. 4).

They are **admitted** by the demurrer (Rec. 17), and by stipulation at the close of the hearing. The facts are set out in the accompanying brief, pp. 9-13.

II. BASIS OF JURISDICTION.

This is a petition for writ of certiorari to review the judgment and decree of the United States District Court for the District of Kansas prior to the decision on appeal by the United States Circuit Court of Appeals for the Tenth Circuit where said appeal is now pending, and prior to the hearing or submission of the case in the appellate court (Sec. 204a, Judicial Code as Amended).[1]

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[1]Sec. 347, Title 28, F. C. A.:

"(a) In any case, civil or criminal, **in** a circuit court of appeals, * * * it shall be competent for the Supreme Court of the United States, upon the petition of any party thereto, whether Government or other litigant, to require by certiorari,

The case comes within the specific provisions of said statute.

Carter v. *Carter Coal Co.*, 298 U. S. 238, 80 L. Ed. 1160.

U. S. v. *Three Friends*, 166 U. S. 1, 41 L. Ed. 897-913.

III. QUESTIONS PRESENTED.

The questions urged for decision of this Court are:

1. Whether by the terms and provisions of Sec. 709a of Title 18, F. C. A., Petitioner's **service** of his sentence **commenced as a matter of law** on January 25, 1940, at the time the United States Marshal, in executing the commitment under which Petitioner is now imprisoned, incarcerated Petitioner in the county jail at Little Rock **to await transportation** to the penitentiary at Leavenworth.

2. Whether Rule V of the rules adopted by the Supreme Court prescribing procedure and practice after verdict in criminal cases, embraces a matter of substantive law which only Congress had power to enact (Const., Art. I, Secs. 1-8) and is therefore unconstitutional and void and could not cause Petitioner's appeal to the Eighth Circuit Court of Appeals to stay or interrupt service of Petitioner's sentence theretofore commenced.

3. Whether the provisions of Sec. 688 of Title 18, F. C. A., by expressly providing that "the rules made as

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either **before** or after the judgment or decree by such lower court, that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted appeal. * * *

(March 3, 1891, Ch. 517, Sec. 6, 26 Stat. 828; March 3, 1911, Ch. 231, Sec. 240, 36 Stat. 1157; February 13, 1925, Ch. 229, Sec. 1, 43 Stat. 938, January 31, 1928, Ch. 14, Sec. 1, 45 Stat. 54; June 7, 1934, Ch. 426, 48 Stat. 926.)"

herein authorized may prescribe the times for and the manner of taking appeals * * * and **the conditions on which supersedeas or bail may be allowed,**" impliedly withheld from the Supreme Court the power to make a rule to stay execution of a judgment in any way other than by an order of court allowing bail pending appeal, or an order recalling an outstanding commitment under which service of sentence had been commenced.

4. Whether Exhibit II (Rec. 18) had the legal effect of suspending the service of Petitioner's sentence during the time he was incarcerated in the county jails, neither the statutes nor rules applicable to the case making any provision for such an election and Petitioner having no authority to change the law as to service of sentence nor to modify the duties of the marshal as to executing the commitment in question.

5. Whether adding one year and two months' imprisonment in jail to the punishment of four years in the penitentiary to which Petitioner was sentenced, is so manifestly unjust and so abhorrent to an enlightened sense of justice that Congress will not be held to have intended such a result by Sec. 688, Title 18, F. C. A.

IV. REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT.

This case presents for the first time important questions as to the constitutionality and as to the interpretation of Rule V of the rules adopted by the Supreme Court of the United States for practice and procedure after verdict in criminal cases in the United States district courts and other courts. It presents for the first time an important question as to the construction of Sec. 688 of Title 18, F. C. A. (February 24, 1933, Ch. 119, Secs. 1 to 3, 47 Stat.

904; March 8, 1934, Ch. 49, 48 Stat. 399; June 7, 1934, Ch. 426, 48 Stat. 926).

An early authoritative decision on these questions is of pressing importance to Petitioner because he has already been imprisoned for approximately eleven months after completing the service of his sentence as required by law. Relief from this flagrant violation of his constitutional rights to liberty will be lost if he is subjected to the delay necessary to reach a decision of his appeal by the Tenth Circuit Court of Appeals before application for certiorari is allowed by this Court.

This Court has declared that the boundary line between substantive law and procedural rules is hazy. The public interest will be promoted by clarification of that boundary line to throw light upon the principles to be applied by the courts in other cases, and by the Advisory Committee now at work on new rules of procedure for criminal cases. Similar questions exist as to many other prisoners and this Court is the only court which can pass upon the validity and interpretation of said rule without embarrassment.

This cause was brought and proceeded to judgment in the District Court of Kansas and aside from the novelty and importance of the issues presented, the case should be reviewed for the additional reason that the decision of the District Court was clearly erroneous and not in accord with the principles of applicable decisions of this Court—among others

Panama Refining Co. v. *Ryan*, 293 U. S. 388, 79 L. Ed. 448.

Williamson v. *U. S.*, 207 U. S. 425, 52 L. Ed. 278.

Sibbach v. *Wilson & Co.*, 312 U. S. 1, 85 L. Ed. 479.

Sunshine Anthracite Coal Co. v. *Adkins*, 310 U. S. 381, 397, 84 L. Ed. 1263, 1273.

Carter v. *Carter Coal Co.*, 298 U. S. 238, 80 L. Ed. 1160.

U. S. v. *Cohen Grovery Co.*, 255 U. S. 81, 65 L. Ed. 516.

Also because of the difference of opinion of the Circuit Court Judges themselves as illustrated in *Aderhold* v. *Ellis*, 81 F. 2d 543 and the conflict between the decisions of various circuit courts and the Supreme Court of the United States, as shown by *Dimmick* v. *Tompkins*, 194 U. S. 540, 48 L. Ed. 1110; *Mosheik* v. *Bates*, 87 F. 2d 211; *Moss* v. *U. S.*, 72 F. 2d 30, and *Shifflett* v. *Hiatt*, 50 F. Supp. 415; *Baker* v. *U. S.*[2]

Petitioner further alleges that since the taking of said appeal to the Tenth Circuit Court of Appeals and the transmission to that court of the transcript of the record of the District Court of Kansas herein, Appellant has, by the lapse of time, completed his full term of imprisonment under the judgment and sentence in question, said four year term having expired on the 24th of January, 1944.

Wherefore, Your Petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the Tenth Circuit, commanding that court to certify and to send to this Court for its review and determination on a day certain therein to be named, a transcript of the record and proceedings herein and that the judgment and order of the United States District Court for the District of Kansas, pending on said appeal to the Tenth Circuit Court of Appeals, be reversed; that it be adjudged that Appellant had completed service of his sentence as required by law, on the 23rd day of

[2]8th Circuit Court of Appeals, Motion to Correct Commitment overruled January 8, 1944; Petition for Rehearing Denied January 29, 1944; Opinion not yet Published, but review in this court is intended.

February, 1943; that Appellant, on January 24, 1944, fully completed service of his sentence in question without regard to any allowance for good behavior and is now entitled to unconditional release; that an order be made for the immediate and unconditional release and discharge of Appellant; and that your Petitioner have such other and further relief in the premises as to this Court may seem meet and just.

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Counsel for Petitioner.

Supreme Court of the United States

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No. .....

NORMAN G. BAKER, PETITIONER,

VS.

WALTER A. HUNTER, WARDEN, UNITED STATES PENITENTIARY, LEAVENWORTH, KANSAS, RESPONDENT.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

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(b) OPINIONS DELIVERED BELOW.

This case apparently will not be reached for hearing by the Tenth Circuit Court of Appeals until the May Term, 1944. No opinion therefore has been rendered by the Circuit Court of Appeals.

The opinion of Circuit Judge Huxman, sitting as the District Court of Kansas, appears in the record, pages 31 to 34.

(c) STATEMENT OF THE GROUNDS ON WHICH JURISDICTION IS INVOKED.

This is a case pending in the Circuit Court of Appeals for the Tenth Circuit and comes within the specific provisions of Section 240a of the Judicial Code as amended. F. C. A., Title 28, Sec. 347.[1]

(d) STATEMENT OF THE CASE.

The case stated in the Petition for Certiorari, pages 1, 2 and 3, is made a part of this brief by reference. The facts in brief are:

Petitioner was tried and found guilty of violation of the postal laws in January, 1940, in the United States District Court at Little Rock, Arkansas. On January 25, 1940, the court overruled motion for new trial and entered judgment sentencing Petitioner to pay a fine of $4,000 and to be committed to the custody of the Attorney General for

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[1]Sec. 347, Title 28, F. C. A.:

"(a) **In any case,** civil or criminal, **in** a circuit court of appeals, * * * it shall be competent for the Supreme Court of the United States, upon the petition of any party thereto, whether Government or other litigant, to require by certiorari, either **before** or after the judgment or decree by such lower court, that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted appeal. * * *"

imprisonment for four years in an institution of the penitentiary type. This judgment contained an order that a **certified copy** thereof should be given to the marshal **to serve as a commitment. No other commitment was ever issued** (Rec. 15).

On **January 25, 1940,** in execution of that commitment, the marshal incarcerated Mr. Baker in the county jail at Little Rock **"to await transportation to the penitentiary"** at Leavenworth, and Petitioner as a matter of law **thereby commenced** the service of his sentence in accordance with Section 709a of Title 18 of the United States Code.

On the next day, January 26, 1940, Petitioner perfected his appeal to the United States Circuit Court of Appeals for the Eighth Circuit. The District Court thereafter denied his application for allowance of bail (Rec. 7).

On January 31, 1940, six days after service of his sentence had commenced in the county jail and while it still continued, Petitioner signed and gave to the marshal the so-called election, Exhibit II (Rec. 18). Imprisonment in jail under the original commitment was continued until March 22, 1941, when the marshal delivered Petitioner to the United States penitentiary at Leavenworth, Kansas, as shown by his return upon the commitment, Exhibit A of the complaint (Rec. 14). The Circuit Court of Appeals affirmed the judgment of the lower court on November 20, 1940, denied petition for rehearing, and on March 13, 1941, issued its mandate to the lower court (Ex. B of complaint), which was filed in the United States District Court at Little Rock on March 15, 1941 (Rec. 16).

While the appeal was pending Petitioner at all times persisted in his right to be admitted to bail and made four applications to the Circuit Court of Appeals for the Eighth Circuit to be admitted to bail (Rec. 7). The appeal was

not frivolous but substantial questions were raised and considered by the Circuit Court of Appeals, including plain error in submitting to the jury issues having no support in the evidence, error in refusing to admit competent evidence to show good faith, misconduct of the United States Attorney, and many others (Rec. 8). His applications were denied by that Court respectively on March 25th, April 22nd, June 24th and October 8th, 1940 (Rec. 7).

No order was made at any time by either the lower court or the Circuit Court of Appeals **to recall the commitment nor to stay** the execution thereof. Petitioner is still being held prisoner in the penitentiary at Leavenworth by Respondent under said original commitment. No other commitment was ever issued against him for either detention or imprisonment (Rec. 12).

Petitioner did not request nor consent to, nor in any way bring about, his delivery to the county jail at Little Rock for detention, but at all times insisted upon his right to be admitted to bail (Rec. 7), although after six days' service of sentence he did sign a so-called election (Ex. II, Rec. 18).

With allowance of seven days per month for each month of his service provided by Section 710 of Title 18, of the United States Code for good behavior, Petitioner had served the full time required by law on the 23rd day of February, 1943.

No charges of misconduct or violation of the rules were made against Petitioner and no punishment of any kind inflicted on him for violation of the rules or for misconduct up to that time, and he acquired a vested right to this good time allowance of 336 days in all. Subtracting that from the four year period from January 25, 1940, to January 25, 1944, made Petitioner's sentence expire on February 23, 1943.

By express terms of the statute, Section 710 of Title 18, the time allowance for good behavior is to be estimated **"commencing on the first day** of his arrival at the **penitentiary, prison or jail** * * * upon a sentence of not less than five years, seven days for each month."

This allowance is made to any prisoner who "is confined, in execution of the judgment or sentence upon any such conviction, in any United States penitentiary or jail or in any penitentiary, prison, or jail of any state or territory, for a definite term other than life," etc.

(e) SPECIFICATION OF ERRORS ASSIGNED.

The petition contains a statement of the Questions Presented, page 4, which for brevity is made a part of this brief for reference.

As the Tenth Circuit Court of Appeals has not heard nor decided the case, no errors can be assigned relative to its action. We shall attempt to comply with Rule 27 by assigning errors as follows:

1. The District Court erred in holding that Appellant was not entitled to credit upon his four years' sentence for the year and two months imprisonment in the county jail after service of his sentence commenced by his being imprisoned in said jail to await transportation to the penitentiary.

2. The District Court erred in holding that Rule V of the rules of the Supreme Court for procedure in criminal cases after verdict in district courts of the United States, was valid and in failing to hold that said rule was void; because

a. It embraced a matter of substantive law which only Congress had constitutional authority to enact.

b. The express terms of Sec. 688 of Title 18, of F. C A., provided that

> "The rules made as herein authorized may prescribe the times for and the manner of taking appeals and applying for writs of certiorari and preparing bills of exceptions and records **and the conditions on which supersedeas or bail may be allowed.**"

and thereby **implicitly withheld** from the Supreme Court the power to make rules for staying execution of sentence in any other way than by prescribing "the conditions on which supersedeas or bail may be allowed."

(f) SUMMARY OF THE ARGUMENT.

Rule V of the Rules of the United States Supreme Court for Criminal Cases After Verdict, is unconstitutional and void for it embodies matters of substantive law which Congress had no power to delegate to the Supreme Court. This is an important constitutional question which should be settled by this Court.

U. S. v. *Hudson,* 65 Fed. Rep. 68.

Erie v. *Tompkins,* 304 U. S. 64, 82 L. Ed. 1188.

Wayman v. *Southard,* 10 Wheat. 1, 6 L. Ed. 253.

Springer v. *Philippine Islands,* 277 U. S. 189, 72 L. Ed. 845.

Article I of the United States Constitution vests all legislative Power in Congress.[2]

Panama Refining Co. v. *Ryan,* 293 U. S. 388, 79 L. Ed. 448.

U. S. v. *Hudson,* 65 Fed. Rep. 68.

Springer v. *Philippine Islands,* 277 U. S. 189, 72 L. Ed. 845.

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[2]"Section 1. All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."

Eisner v. *Macomber*, 252 U. S. 189, 64 L. Ed. 521.

U. S. v. *Cohen Grocery Co.*, 255 U. S. 81, 65 L. Ed 516.

Sunshine Anthracite Coal Co. v. *Adkins*, 310 U. S. 381, 397, 84 L. Ed. 1263-1273.

Opp. Cotton Mills v. *Administrator*, 312 U. S. 126, 85 L. Ed. 624.

It is well settled that substantive laws can be enacted only by Congress and Congress cannot delegate to the Supreme Court power to enact substantive laws in the guise of prescribing rules of procedure.

Panama Refining Co. v. *Ryan*, 293 U. S. 388, 79 L. Ed. 448.

U. S. v. *Hudson*, 65 Fed. Rep. 68.

Williamson v. *U. S.*, 207 U. S. 425, 52 L. Ed. 278.

Lynch v. *Tilden Produce Co.*, 265 U. S. 315, 68 L. Ed. 1034.

Great Lakes Hotel Co. v. *Comm.*, 30 F. 2d 1.

Griswold v. *U. S.*, 36 F. Supp. 714.

U. S. v. *Eaton*, 144 U. S. 677, 36 L. Ed. 591.

U. S. v. *Two Hundred Barrels of Whiskey*, 95 U. S. 571, 24 L. Ed. 491.

Sibbach v. *Wilson & Co.*, 312 U. S. 1, 85 L. Ed. 479.

Sunshine Anthracite Coal Co. v. *Adkins*, 310 U. S. 381, 397, 84 L. Ed. 1263, 1273.

Opp. Cotton Mills v. *Administrator*, 312 U. S. 126, 85 L. Ed. 624.

Carter v. *Carter Coal Co.*, 298 U. S. 238, 80 L. Ed. 1160.

U. S. v. *Cohen Grocery Co.*, 255 U. S. 81, 65 L. Ed. 516.

The line between substantive law and procedural rules is hazy and the distinction between them is difficult and delicate and requires clarification by this Court.

Erie v. *Tompkins*, 304 U. S. 64, 82 L. Ed. 1188.
Wayman v. *Southard*, 10 Wheat. 1, 6 L. Ed. 253.
Keary v. *Farmers and Mer. Bank*, 16 Pet. 89, 10 L. Ed. 897.
Beers v. *Haughton*, 9 Pet. 329, 9 L. Ed. 145.
Cities Service Oil Co. v. *Dunlap*, 308 U. S. 208, 84 L. Ed. 196.
Central Vermont R. Co. v. *White*, 238 U. S. 507, 59 L. Ed. 1433.
Continental Casualty Co. v. *U. S.*, 314 U. S. 527, 86 L. Ed. 426.
Kring v. *Mo.*, 107 U. S. 221, 27 L. Ed. 506.

Sec. 688, Title 18, F. C. A., did not authorize the Supreme Court to provide by rule for stay of execution of judgment for imprisonment in any way other than by allowance of bail.

Durousseau v. *U. S.*, 6 Cranch 307, 3 L. Ed. 232.
U. S. v. *Arredondo*, 6 Pet. 691, 8 L. Ed. 547.
Stephens v. *Smith*, 10 Wall. 321, 19 L. Ed. 933.
Raleigh and G. R. Co. v. *Reid*, 80 U. S. 269, 20 L. Ed. 570.
Ford v. *U. S.*, 273 U. S. 593, 71 L. Ed. 793.
U. S. v. *Barnes*, 222 U. S. 513, 56 L. Ed. 291.
Neuberger v. *Comm.*, 311 U. S. 83, 85 L. Ed. 59.
White v. *Burke*, 43 F. 2d 329.
Continental Casualty Co. v. *U. S.*, 314 U. S. 527, 86 L. Ed. 426.
Roberts v. *U. S.*, 88 U. S. L. Ed. Adv. Op. 69.

The flagrant violation of Petitioner's constitutional right to liberty by continued imprisonment after service of the full term of his sentence, is an urgent reason why

this Court should not permit relief to be delayed by requiring Petitioner to prosecute his appeal to the Circuit Court of Appeals and await its decision in the ordinary course of its procedure. Such delay in itself would defeat his right to relief.

Harlan, Ex parte, 180 Fed. 119.

Sioux Falls v. *Marshall,* 204 U. S. 999, 45 A. L. R. 447.

Tinkoff v. *Zerbst,* 80 F. 2d 464.

Carter v. *Carter Coal Co.,* 298 U. S. 238, 80 L. Ed. 1160, 56 S. Ct. 855.

U. S. v. *Three Friends,* 166 U. S. 1, 41 L. Ed. 897-913.

(g) ARGUMENT.

I.

Service of Petitioner's Four Year Term of Imprisonment to Which He Was Sentenced, Began on January 25, 1940, When in Executing the Commitment in Question, Petitioner Was Imprisoned in the County Jail at Little Rock by the United States Marshal to Await Transportation to the Penitentiary.

On January 5, 1940, Petitioner was imprisoned by the United States Marshal in the jail at Little Rock **"to await transportation to the penitentiary."** This is established by the allegations of the complaint (Rec. 4, 6) and admitted by the demurrer (Rec. 17).

By the express terms of Sec. 709a of Title 18, F. C. A., service of petitioner's sentence began at that time. The very wording of Section 709a specifically provides that

> "If any such person shall be committed to a jail or other place of detention to await transportation to the place at which his sentence is to be served, the sentence of such person shall commence to run from the date on which he is received **at such jail** or other place of detention."

This is emphasized by the following sentence:

> "No sentence shall prescribe any other method of computing the term."

Thus the provision quoted was made exclusive and no court had power to modify it.

Previous to the passage of the section quoted, courts often provided in judgments in criminal cases that service

of sentence should commence at a time prior to the tri
in order to allow defendants the benefit of imprisonme
already suffered.

In *Eyler* v. *Aderhold*, (C. C. A. 5) 73 F. 2d 372, it w
held that in sentencing a person, a judge should ta
into consideration time spent in jail awaiting trial, b
that credit for such time could not be given unless it w
expressly so stated in the commitment, but in *U. S.*
Hill, 74 F. 2d 822, the court of appeals held that the servi
of a sentence pronounced in December, 1932, commence
on the date of commitment and that a portion of the sen
tence directing that service should commence October 1
1932, was void.

To meet this condition, Congress passed Section 709a
Title 18, F. C. A. Knowing that there was often delay be
tween the issuance of the commitment after judgment i
a criminal case and the actual receipt of the prisoner a
the penitentiary, it enacted the provision that sentence
shall commence to run from the date a prisoner is **com-
mitted to a jail to await transportation** to the penitentiary.

Since that time it has been repeatedly held that serv-
ice of sentence commenced at the time of commitment to
a place of detention to await transportation to the peniten-
tiary and that after sentence had so commenced, the court
lost its power to suspend sentence or put the prisoner on
probation, or to increase sentence. It is so held in

Moss v. *U. S.*, **72 F. 2d 30.**
Trant v. *U. S.*, 90 F. 2d 718.
Mosheik v. *Bates*, 87 F. 2d 211.
Shifflett v. *Hiatt*, 50 F. Supp. 415.

In *U. S.* v. *Murray*, 275 U. S. 347-358, 72 L. Ed. 309-
315, the court said:

> "The beginning of the service of the sentence in a criminal case ends the power of the court even in the same term, to change it."

The difference between Section 709a and the pre-existing law is illustrated in *Gorovits* v. *Sartain*, 1 F. 2d 602, where defendant, under the old law, was refused credit upon his sentence for the period from November 9th to December 14th during which he was held in jail to await transportation to the penitentiary. Doubtless the Gorovits decision was influential in leading to the enactment of Section 709a.

Not only is it admitted by the demurrer that Petitioner was committed to the Little Rock jail "to await transportation" to the penitentiary, but the return of the marshal (Rec. 14) recites:

> "I **have executed** the within judgment and commitment as follows: Defendant delivered on January 25, 1940, to Pulaski County Jail at Little Rock, Ark."

Obviously the Little Rock jail was not the place specified in the commitment for imprisonment of Petitioner and the only way his delivery to that jail could have been in execution of the commitment was to deliver him there for detention to await transportation to the penitentiary.

II.

Rule V Unconstitutional and Void.

Rule V of the Supreme Court rules of practice and procedure in criminal cases (78 L. Ed. 1512, 7 F. C. A., page 431) did not have the effect of causing Petitioner's appeal to the Eighth Circuit Court of Appeals from the judgment in question to stay or interrupt the service of his sentence commenced as stated in Division I, because

(a) Said Rule V is unconstitutional and void for it embraces a matter of substantive law which could be enacted only by Congress, and conflicts with Title 18, Section 709a, F. C. A.

(b) Sec. 688 of Title 18, F. C. A.[3] empowered the Supreme Court to prescribe rules of practice and procedure with respect to proceedings in criminal cases after verdict, and nothing more.

Constitution Vests All Legislative Power of the Government in Congress (Art. I, Sections 1 and 8).

That Congress cannot delegate power to legislate—to enact substantive laws—has been held so often that it is not open to dispute.

Panama Refining Co. v. *Ryan*, 293 U. S. 388, 79 L. Ed. 446.

Holiday v. *Johnston*, 313 U. S. 342, 85 L. Ed. 1392.

Morrill v. *Jones*, 106 U. S. 466, 27 L. Ed. 267.

U. S. v. *United Verde Copper Co.*, 196 U. S. 207, 49 L. Ed. 449.

Williamson v. *U. S.*, 207 U. S. 425, 52 L. Ed. 278.

U. S. v. *Grimaud*, 220 U. S. 506, 55 L. Ed. 563.

Thus in *Panama Refining Co.* v. *Ryan, supra,* it is said that the principle that Congress cannot delegate legislative power "is universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution."

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[3]"The Supreme Court of the United States shall have the power **to prescribe**, from time to time, **rules of practice and procedure** with respect to any or all proceedings after verdict * * * in criminal cases in district courts of the United States.

"The right of appeal shall continue in those cases in which appeals are now authorized by law, but **the rules** made as herein authorized **may prescribe** the **times for** and the **manner** of taking appeals and applying for writs of certiorari and preparing records and bills of exceptions and the **conditions** on which supersedeas or bail **may be allowed.**"

That there is a difference between substantive law and rules of procedure or practice, is equally well established.

Panama Refining Co. v. *Ryan, supra; Cities Service Oil Co.* v. *Dunlap,* 308 U. S. 208, 84 L. Ed. 196, where the burden of proof as to the *bona fide* purchaser was held to be a matter of substantive law; *Central Vermont R. Co.* v. *White,* 236 U. S. 507, 59 L. Ed. 1435, where the burden of proof respecting contributory negligence was held to be a matter of substantive law. See also *Sibbach* v. *Wilson,* 312 U. S. 1, 65 L. Ed. 479.

Boundary Line Hazy.

In *Erie* v. *Tompkins,* 304 U. S. 64, 82 L. Ed. 1188, it is said (page 92):

> "The line between procedural and substantive law is hazy."

In *Wayman* v. *Southard,* 10 Wheat 1, 6 L. Ed. 253, it is said (p. 44) that the boundary of the power to make, and to execute, and to construe the law "is a subject of delicate and difficult inquiry."

The courts have never undertaken to define the line between substantive and procedural law and some clarification of that subject is greatly needed.

That punishment for crime is a matter of substantive law, is so plain as to need no argument. A prisoner's right to release after he has fully served his sentence as required by law, is plainly a substantive right. So, when Congress prescribes what facts shall constitute service of a sentence for crime, that is also a matter of substantive law, and when a prisoner has performed the service required by statute, he has a substantive right to his liberty.

This is one of those matters which is so plain that no amount of argument can make it any plainer.

III.

Expressio Unius Est Exclusio Alterius.

Sec. 688 of Title 18, F. C. A., expressly provides that:

> "The rules made as herein authorized may prescribe the times for and the manner of taking appeals * * * and the conditions on which supersedeas or bail may be allowed."

and thereby impliedly withheld from the Supreme Court the power to make a rule for staying execution of the judgment in a criminal case in any way other than by **order of court allowing** bail pending appeal or by order of court recalling an outstanding commitment under which service of sentence had been commenced.

Passing the question of whether the right to bail, as held in *U. S.* v. *Hudson,* 65 Fed. 68, is a substantive right which can be prescribed only by Congress, we submit that the very wording of Section 688 quoted above, giving the Supreme Court power to prescribe by rule "the conditions on which **supersedeas or bail may be allowed**" impliedly withholds from the court the right to make a rule providing for a stay of execution of sentence in any other way.

The right to bail pending appeal is a legislative right rather than a constitutional right, so if Congress intended the Supreme Court to have power to make a rule staying execution of sentence generally, why didn't Congress say so? The rule is well settled that the statutory powers of the courts are exclusive of other powers.

The rule set out in the maxim quoted above is well settled and has been affirmed by the Supreme Court for more than a hundred years.

Thus in *Durousseau* v. *U. S.,* 6 Cranch 307, 3 L. Ed. 232-234, it is said:

"When the first legislature of the Union proceeded to carry the third article of the constitution into effect, they must be understood as intending to execute the power they possessed of making exceptions to the appellate jurisdiction of the Supreme Court. They have not, indeed, made these exceptions in express terms. They have not declared that the appellate power of the court shall not extend to certain cases; but they have described affirmatively its jurisdiction, and this affirmative description has been understood to **imply a negative** on the exercise of such appellate power as is not comprehended within it."

In *U. S.* v. *Arredondo*, 6 Pet. 691, 8 L. Ed. 547-560, the court said:

"'Or whenever either of the said boards shall not be satisfied that such grant, warrant or order of survey, did issue at the time it bears date, the said commissioners shall not be bound to consider such grant, warrant, or order of survey as conclusive evidence of the title, but may require such other proof of its validity as they may think proper.' Nothing can more clearly manifest the understanding of Congress that such grant, etc., was conclusive evidence of title, and that the commissioners were **not,** under the existing laws, at liberty to require from the claimants any other proof than their conferring on them by express words the power of doing so. **Expressio unius est exclusio alterius,** is an universal maxim in the construction of statutes."

In *Stephens* v. *Smith*, 10 Wall. 321, 19 L. Ed. 933-395, it is said:

"It needs no argument of authority to show that the statute, having provided the way in which these half-breed lands could be sold, by **necessary implication** prohibited their sale in any other way."

In *Raleigh and G. R. Co.* v. *Reid*, 80 U. S. 269, 20 L. Ed. 570, the Supreme Court said:

> "And this was the only way in which the property of the Company could be reached for taxation at all, for when a statute limits a thing to be done in a particular mode, it **includes a negative of any other mode."**

The maxim is referred to with approval in *Ford* v. *U. S.*, 273 U. S. 593, 611, 71 L. Ed. 793-801, 802, but in that case it was held a necessary inference from the law, that both the ship and those on board were to be subject to prosecution on incriminating evidence, and therefore the maxim was not applicable to the statute and treaty there in question.

In *U. S.* v. *Barnes*, 222 U. S. 513-521, 56 L. Ed. 291-294, the court said in substance that while the express extension of particular sections in Chapter 3 dealing with special taxes, to like taxes imposed by Section 3 of the oleomargarin act might operate as an **implied exclusion of the other sections in that chapter,** it did not restrict the operation of general sections in the other chapters.

There is nothing contrary to this rule in *Neuberger* v. *Comm.*, 311 U. S. 83, 85 L. Ed. 59, where it was said that the maxim "can never override clear and contrary evidences of Congressional intent."

In *White* v. *Burke*, 43 F. 2d 329 (C. C. A. 10th), involving the construction of an act permitting the court to grant probation before service of sentence commenced, the court said:

> "The grant of the express power to impose the lesser punishment, namely, the payment of a fine **excludes** the power to impose the greater punishment, namely, the serving of a period of imprisonment, as a condition of probation."

A late case in the Supreme Court upon this subject, is *Continental Casualty Co.* v. *U. S.*, 314 U. S. 527, 86 L. Ed. 426, where the court said (page 431):

> "Whatever may have been the powers of the courts of the United States before the statute, those powers are now regulated by statute. Cf. *United States* v. *Mack*, 295 U. S. 480, 488, 79 L. Ed. 1559, 1564, 55 S. Ct. 813. These statutory powers are exclusive. Before remission may be allowed there must be a determination of lack of willfulness in the default, that a trial can be had, and that public justice does not otherwise require the enforcement of the penalty. The statement of the conditions negatives action without the satisfaction of those requirements. Generally speaking a 'legislative affirmative description' **implies denial** of the non-described powers. *Durousseau* v. *United States*, 6 Cranch (U. S.) 307, 314, 3 L. Ed. 232, 234."

The latest case we have found on this subject is *Roberts* v. *U. S.*, 88 U. S. L. Ed. Adv. Op., p. 69, where the Court said:

> "But before we can conclude that the Act authorized the District Court thereafter to increase the sentence imposed by the original judgment we must find in it **a legislative grant of authority** to do four things: revoke probation, revoke suspension of execution of the original sentence; **set aside the original sentence;** and enter a new judgment for a long imprisonment.
>
> "* * * It is clear that power to do the first two things, revoke the probation and the suspension of sentence, is expressly granted by Section 2. It is equally clear that power to do the third, set aside the original sentence, is **not expressly granted.** If we find this power we must resort to inference."

and held it was not granted by inference.

IV.

Did the Election Referred to in the Opinion of Judge Huxman (Rec. 18) Have Any Legal Effect to Suspend the Service of Petitioner's Sentence, Neither the Statutes Nor Rules Applicable to the Case Making Any Provision for Such Election and Petitioner Having No Authority to Change the Law As to Service of Sentence Nor to Modify the Duties of the Marshal As to Executing the Commitment in Question.

Question 4 raises the question whether the so-called election had any legal effect to suspend the service of Petitioner's sentence on January 31, 1940, after he had served six days while awaiting transportation to the penitentiary.

As we understand the judgment of the lower court, it was based upon the ground that Rule V of the rules of practice adopted by the Supreme Court in criminal cases, operated **ipso jure** to stay the execution of the sentence in question at the time the appeal was taken on January 26th and that the court took the position that there was no provision of either statute or rules for an election not to commence service of the sentence, and the so-called election was nugatory (Rec. 23). The court said:

> "The situation as I understand it is the same as though he had not elected to remain in jail because he would have remained in jail, would he not? He could have elected to enter upon his service of his sentence, that would have made a difference, but as long as he did not do that there wasn't any need of him electing to remain in jail. We can forget his electing."

And at the conclusion of his opinion as dictated, he said (Rec. 33):

> "Rule V of the criminal rules of procedure by the Supreme Court provides in substance that appeal

> from a judgment of conviction stays the execution of the judgment unless the defendant pending his appeal elects to enter upon the service of his sentence. * * * In my opinion, there is no conflict between Section 709a and Rule V, but even if it be conceded that there is, Rule V prevails."

Also (Rec. 34):

> "Both Rule V and Section 709a deal with the sentence and the time when it begins to run. The Supreme Court was granted power to make rules concerning this matter and Rule V when adopted became the law because it was passed, adopted subsequent to the passage of 709a."

Obviously this Court should also regard the election as nugatory, for while Appellant did have a right to make application to the court for an order of supersedeas to stay the execution of the sentence, as held in *Hovey* v. *McDonald*, 109 U. S. 150, 27 L. Ed. 888, and the court had power to make an order to allow Appellant to remain in the county jail to assist his counsel pending decision of the appeal, as the court did do in *Demarois* v. *Hudspeth*, 99 F. 2d 274, *Smith* v. *Hiatt*, 48 F. Supp. 747, and *Dimmick* v. *Tompkins*, 194 U. S. 540, 48 L. Ed. 1110, the court **did not do so.**

He only applied to the court to be allowed bail, which the court refused. He persisted in his application for bail, making four applications to the Eighth Circuit Court of Appeals, all of which were refused (Rec. 7).

As held in *Holmes* v. *U. S.*, 126 F. 2d 432, he would have lost his right to be admitted to bail if he had elected to commence service of his sentence in the penitentiary.

That Sec. 688 of Title 18, F. C. A., implied that the court would have to make a specific order granting supersedeas and that after service of sentence had been com-

menced, would have to issue an order recalling the commitment, is apparent from *Hovey* v. *McDonald*, *supra*, where the court said:

"A supersedeas, properly so called, is a suspension of the power of the court below **to issue** an execution on the judgment or decree appealed from; or, if a writ of execution has issued, **it is a prohibition emanating from the court of appeal** against the execution of the writ. It operates from the time of the completion of those acts which are requisite to call it into existence. If, before those acts are performed, **an execution has been lawfully issued, a writ of supersedeas directed to the officer holding it will be necessary; but if the writ** of execution has been **not only lawfully** issued, **but actually executed, there is no remedy until the appellate proceedings are ended.** * * *"

In the case at bar, the execution or commitment had been lawfully issued and executed to the extent of putting Appellant in the county jail to await transportation to the penitentiary. Therefore a writ of supersedeas directed to the officer holding the commitment was necessary. No such writ was issued. The commitment was not recalled. Service of sentence which had commenced under the specific terms of Sec. 709a, Title 18, F. C. A., necessarily continued.

V.

Manifest Injustice.

Is adding one year and two months' imprisonment in jail to the punishment of four years in the penitentiary to which Petitioner was sentenced, so manifestly unjust and so abhorrent to an enlightened sense of justice that Congress will not be held to have intended such a result by Sec. 688, Title 18, F. C. A.?

The injustice of refusing to allow a prisoner to be released on bail pending appeal, of keeping him imprisoned for a year and two months while the appeal is pending, and then refusing to allow him credit upon the term of his sentence for such year and two months, is abhorrent to reason.

Common sense decrees it to be unfair. The universal judgment of common men would be that it was neither fair nor right nor justice.

Surely, if such procedure would be repugnant to the common citizens of this great republic, it ought to be equally repugnant to the trained minds and the refined sensibilities of its highest judicial officers.

Under *Carroll* v. *Squier*, 136 F. 2d 571, Secs. 710 and 710a of Title 18, F. C. A., became a part of Petitioner's sentence and he had a vested right to release under those sections on February 23, 1943. It was the Warden's duty to discharge him at that time. See also *Douglas* v. *King*, 110 F. 2d 911, 127 A. L. R. 1200.

In conclusion, we respectfully urge that this is not a case where Appellant escaped from the marshal or from the penitentiary. It is not a case where Appellant asked the court for an order superseding judgment, except as he asked for the allowance of bail, which was refused. It is not a case where the court made any order to stay the execution of the sentence nor to recall the commitment.

It is a case where Appellant was plainly delivered to the county jail for detention to await transportation to the penitentiary and thereby by force the statutory command, commenced service of his sentence. It is a case where the only reason why the marshal kept Appellant in the county jail for a year and two months was because the Supreme Court by Rule V undertook to stay the execution of the sentence.

Thus the continued detention in jail after appeal and refusal of bail, was due wholly to the act of the United States, for the act of the Supreme Court was the act of the official representative of the United States. Being the act of the United States, as held in *Albori* v. *U. S.*, 67 F. 2d 4, it cannot be attributed to Appellant and Appellant is entitled to credit upon his sentence for the time spent in jail. On January 24, 1944, the full four years' service of Appellant's sentence was completed and we modestly but strenuously urge that he is now entitled to and should be granted immediate and unconditional release.

Respectfully submitted,

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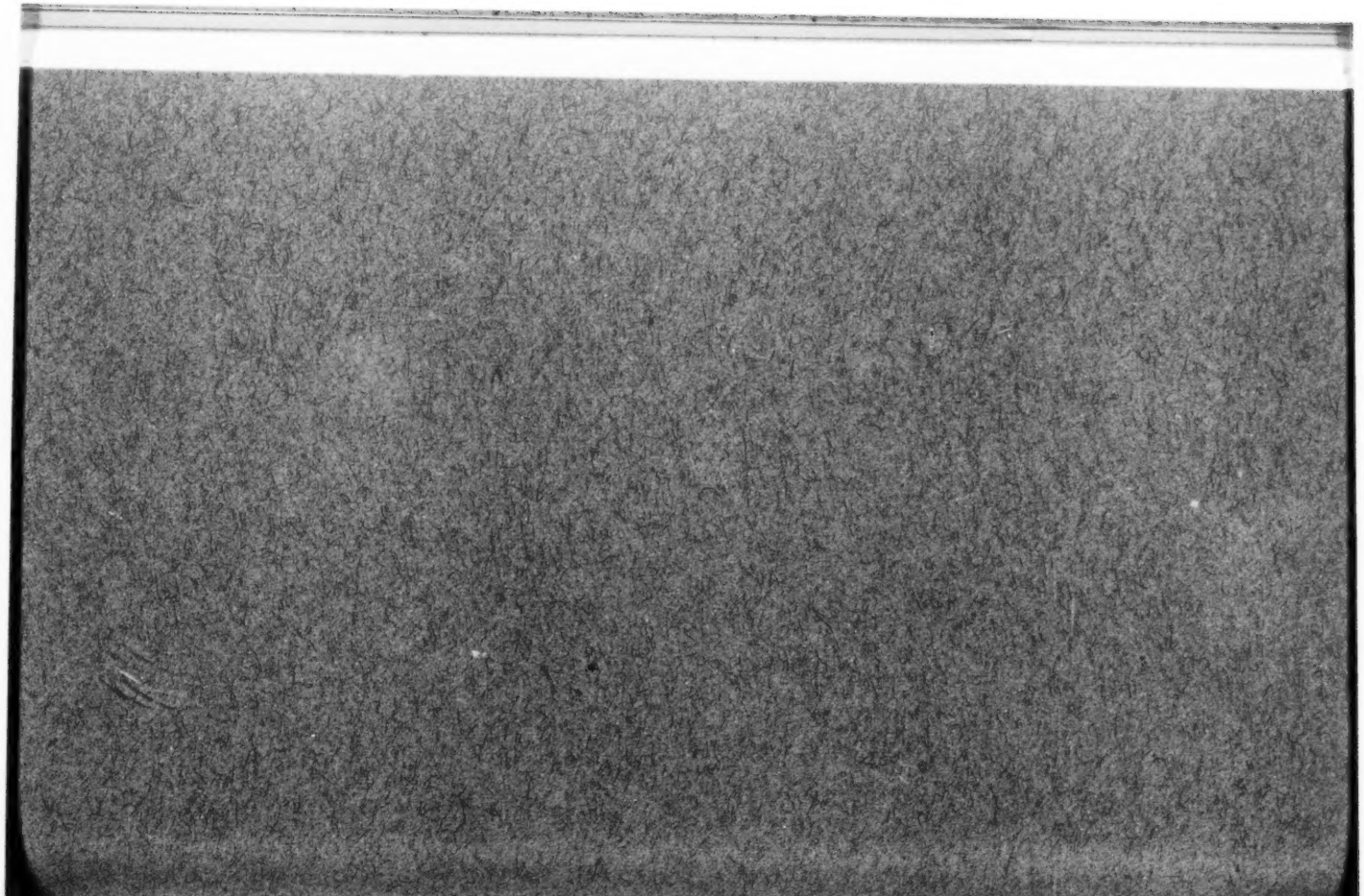
In the



INDEX

CITATIONS

576828—44

In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 700

NORMAN G. BAKER, PETITIONER

v.

WALTER A. HUNTER, WARDEN, UNITED STATES PENITENTIARY, LEAVENWORTH, KANSAS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

No opinion has been rendered by the circuit court of appeals, petitioner having filed his petition for a writ of certiorari prior to hearing and submission in that court. The oral opinion of the district court discharging the writ of habeas corpus appears at pages 33–34 of the record and the court's findings of fact and conclusions of law appear at pages 20–21.

JURISDICTION

The judgment of the District Court for the District of Kansas discharging the writ of habeas

corpus was filed November 2, 1943 (R. 21), and petitioner filed a notice of appeal to the circuit court of appeals on December 1, 1943 (R. 21–22). The petition for a writ of certiorari before hearing and submission in the circuit court of appeals was filed February 15, 1944. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (Pet. 3, 9). See also Section 8 (b) of the Act of February 13, 1925 (28 U. S. C. 350).

QUESTIONS PRESENTED

Whether Rule V of the Criminal Appeals Rules promulgated by this Court May 7, 1934, is a proper exercise of the rule-making power conferred upon this Court by the Act of February 24, 1933, as amended (18 U. S. C. 688).

STATUTES AND RULE INVOLVED

The Act of February 24, 1933, c. 119, 47 Stat. 904, as amended by the Act of March 8, 1934, c. 49, 48 Stat. 399 (18 U. S. C. 688), provides in pertinent part as follows:

> SEC. 1. The Supreme Court of the United States shall have the power to prescribe, from time to time, rules of practice and procedure with respect to any or all proceedings after verdict, or finding of guilt by the court if a jury has been waived, or plea of guilty, in criminal cases in district courts of the United States, * * *.

> SEC. 2. The right of appeal shall continue in those cases in which appeals are now authorized by law, but the rules made as herein authorized may prescribe the times for and manner of taking appeals and applying for writs of certiorari and preparing records and bills of exceptions and the conditions on which supersedeas or bail may be allowed.

Rule V of the Criminal Appeals Rules promulgated by this Court May 7, 1934 (292 U. S. 661), provides:

> An appeal from a judgment of conviction stays the execution of the judgment, unless the defendant pending his appeal shall elect to enter upon the service of his sentence.[1]

The Act of June 29, 1932, c. 310, § 1, 47 Stat. 381 (18 U. S. C. 709a), provides:

> The sentence of imprisonment of any person convicted of a crime in a court of the United States shall commence to run from the date on which such person is received at the penitentiary, reformatory, or jail for service of said sentence: *Provided,* That if any such person shall be committed to a jail or other place of detention to await transportation to the place at which his sentence is to be served, the sentence of such person shall commence to run from the

[1] This rule was amended insofar as fines are concerned subsequent to the filing of the notice of appeal. (18 U. S. C., Sup. II, following 689.)

date on which he is received at such jail or other place of detention. No sentence shall prescribe any other method of computing the term.

STATEMENT

Petitioner was convicted in the United States District Court for the Eastern District of Arkansas on seven counts charging use of the mails in the execution of a scheme to defraud and was, on January 25, 1940, sentenced generally to pay a fine of $4,000 and to imprisonment for four years in an institution of the penitentiary type to be designated by the Attorney General. The judgment required that a certified copy thereof be delivered to the marshal to serve as the commitment (R. 13–14). That same day petitioner was delivered by the marshal to the county jail at Little Rock, Arkansas (R. 14). The next day, January 26, 1940, petitioner filed a notice of appeal from the judgment of conviction (R. 7, 14). Applications for bail pending appeal were denied, both by the district court and the circuit court of appeals (R. 7–8, 14), and petitioner remained in the county jail. On January 31, 1940, he wrote to the marshal stating that until further notice he elected to remain at the county jail instead of beginning service of his sentence in a federal prison (R. 18; see also R. 14). The Circuit Court of Appeals for the Eighth Circuit affirmed petitioner's conviction on November 20, 1940 (R. 16; see 115 F. (2d) 533), and this Court denied cer-

tiorari on February 17, 1941 (312 U. S. 692), and denied rehearing on March 3, 1941 (312 U. S. 715). The mandate of the circuit court of appeals was issued on March 13, 1941, and was filed in the district court on March 15, 1941 (R. 16; see also R. 14). Petitioner was delivered to the United States penitentiary at Leavenworth, Kansas, on March 22, 1941 (R. 14).

On August 2, 1943, petitioner filed in the District Court for the District of Kansas an application for a writ of habeas corpus in which he contended that the time spent in the county jail during the pendency of his appeal was in execution of his sentence and that, with good time allowance, he was entitled to his release (R. 4–13).[2] Respondent demurred to the petition (R. 17), a writ of habeas corpus ad testificandum issued (R. 19), and after a hearing, at which petitioner was present and represented by counsel (R. 21, 26–34), the district court on November 2, 1943, discharged the writ of habeas corpus and remanded petitioner to the custody of respondent (R. 21); the court held that by virtue of Rule V of the Criminal Appeals Rules the execution of

[2] In 1941 petitioner sought to obtain his release on habeas corpus on the ground that he was prejudiced at his trial by the conduct of the jurors and the deputy marshals who had them in charge. After a hearing the district court determined the issues against petitioner and discharged the writ. The judgment was affirmed by the Circuit Court of Appeals for the Tenth Circuit (129 F. (2d) 779) and this Court denied certiorari (317 U. S. 681, rehearing denied, 317 U. S. 711).

petitioner's sentence was stayed by his appeal and, therefore, he was not entitled to credit for the time spent in the county jail pending the appeal (R. 33–34; see also R. 20–21).

On December 1, 1943, petitioned filed a notice of appeal to the United States Circuit Court of Appeals for the Tenth Circuit (R. 21–22).[3]

ARGUMENT

Petitioner's right to be released at the present time depends upon whether he is entitled to credit for the time he spent in the county jail from January 26, 1940, when he filed his notice of appeal, to March 15, 1941, when the mandate of the circuit court of appeals was filed in the district court (see pp. 4–5, *supra*). If that time is credited against his sentence, petitioner has already served the maximum term of four years; if not, petitioner's maximum term will expire in March 1945, and, unless his remaining good time allowance is forfeited, he will be entitled to his conditional release on July 19, 1944.[4]

Under Rule V of the Criminal Appeals Rules promulgated by this Court May 7, 1934, the filing of petitioner's notice of appeal resulted in an automatic stay of the execution of his sentence

[3] We are advised by the office of the Clerk of this Court that the argument in the circuit court of appeals is set for March 23, 1944.

[4] The record shows (R. 20, 23) and the Bureau of Prisons advises us that 100 days of petitioner's good time allowance were forfeited on April 8, 1943.

in the absence of an election to commence service pending appeal. Petitioner did not so elect. On the contrary, he affirmatively elected not to enter upon service of his sentence (R. 18).[5] Hence, there can be no question that, if Rule V is valid, petitioner is not entitled to credit on his sentence for the time spent in the county jail pending his appeal.

Petitioner contends (Pet. 12, 13–15, 19–21) that Rule V embodies a matter of substantive law, the regulation of which Congress could not constitutionally delegate to this Court. It is unnecessary to determine whether, as petitioner argues (Pet. 21), the right to prescribe "what facts shall constitute service of a sentence" is a matter of substantive law, for it is clear that Rule V does not relate to such facts. Rule V is merely a regulation of the terms and conditions of appeals in criminal cases. Historically, the power to stay enforcement of a judgment pending the outcome of an appeal has always been considered part of an appellate court's "traditional equipment for the administration of justice". *Scripps-Howard Radio* v. *Federal Communications Comm'n,* 316 U. S. 4, 9–10. After the passage of the Act of March 3, 1891 (26 Stat. 827), conferring upon a

[5] As the district court stated (R. 23; see Pet. 26), this notice was unnecessary, since under Rule V the filing of the notice of appeal stayed execution of the judgment. The notice does, however, establish beyond dispute that petitioner did not elect to commence service of his sentence pending the appeal.

person convicted of an infamous crime the right of review by this Court, the Court said that it had power to issue a supersedeas in such a case under its authority to issue "all writs * * * necessary for the exercise of its jurisdiction and agreeable to the usages and principles of law." *In re Claasen,* 140 U. S. 200, 207–208; see also *Hudson* v. *Parker,* 156 U. S. 277, 284. The Court also said in the *Claasen* case (p. 208) that under the general statutes governing supersedeas, a Justice of this Court had power to grant a stay in a criminal case, but, to remove all doubt on the subject, the Court announced in the *Claasen* decision that it had adopted a general rule governing the granting of supersedeas in such cases by a Justice (see also *Hudson* v. *Parker, supra,* at 283). The substance of this rule was carried through subsequent revisions of the rules of this Court.[6]

Prior to 1934, Congress chose to regulate by statute the conditions upon which a supersedeas could be granted in order to avoid the common law rule that a writ of error in itself operated as a stay of execution.[7] This fact, however, does not affect the judicial character of the relief afforded by a supersedeas pending appeal and does not prevent Congress from delegating to the courts the power to regulate the conditions thereof. As

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[6] See *Tinkoff* v. *United States,* 86 F. (2d) 868, 882 (C. C. A. 7), certiorari denied, 301 U. S. 689.

[7] *Kitchen* v. *Randolph,* 93 U. S. 86, 87; see also *Tinkoff* v. *United States, supra,* at 881.

early as 1825, in *Bank of the United States* v. *Halstead,* 10 Wheat. 51, 60, this Court stated, in respect of an analogous question as to the authority of the courts to prescribe what property shall be subject to execution:

> It is said, however, that this is the true exercise of legislative power, which could not be delegated by congress to the courts of justice. But this objection cannot be sustained. * * * Congress might regulate the whole practice of the courts, if it was deemed expedient so to do: but this power is vested in the courts; and it never has occurred to any one, that it was a delegation of legislative power.[8]

The Federal Rules of Civil Procedure (Rules 72 and 73), regulate the conditions of supersedeas on appeals in civil cases and modify prior statutes with respect thereto, although the enabling act (28 U. S. C. 723b, 723c) contains no express grant of power to regulate the terms and conditions of appeals.[9] There can be no question, therefore, that the grant of authority to this Court under the Act of February 24, 1933 (28 U. S. C. 688), to prescribe by rule the conditions on which

[8] See also *Wayman* v. *Southard,* 10 Wheat. 1, 41, 44; *Beers* v. *Haughton,* 9 Peters 328, 359; Scott, *Actions at Law in the Federal Courts,* 38 Harv. L. Rev. 1, 3 (1924).

[9] See Notes to Rules 72 and 73 of the Rules of Civil Procedure prepared by the Advisory Committee in U. S. C. (1940 ed.). Clark, *Power of the Supreme Court to Make Rules of Appellate Procedure,* 49 Harv. L. Rev. 1303, 1312–1320 (1936); see also Foreword (pp. XI–XII) to Preliminary Draft of the Rules (May 1936).

supersedeas may be allowed involves no unconstitutional delegation of legislative power.

Nor is there any merit in petitioner's contention (Pet. 13, 22–28) that in conferring upon this Court the specific authority to prescribe conditions on which supersedeas or bail may be allowed, Congress did not authorize the Court to lay down a rule which would operate automatically without reference to the circumstances of each individual case. In accordance with its powers to fix conditions of supersedeas, this Court in Rule V prescribed that an appeal is the only condition for a stay. Prior to the promulgation of the Rules, this was not so. The supersedeas had to be allowed by a court or judge and in the absence of such an allowance the defendant could be compelled to enter upon service of his sentence pending appeal. *Tinkoff* v. *United States,* 86 F. (2d) 868, 881–883 (C. C. A. 7), certiorari denied, 301 U. S. 689; Longsdorf, *Cyclopedia of Federal Procedure,* Vol. 5, p. 813. In accordance with their purpose to simplify procedure, the Rules eliminated the necessity for the allowance of supersedeas, just as they eliminated the necessity for allowance of an appeal, but they preserved the right of the defendant to commence service of his sentence pending appeal if he wished to do so. In practical effect, the rights of the defendant remain the same; only the procedure was changed. He may, if denied bail, remain in temporary custody pending appeal or he may serve his sentence during such period.

However, both before and after the promulgation of Rule V, if a defendant whose application for bail had been denied chose not to enter upon service of his sentence, he was not entitled to have the time spent in custody pending appeal credited against his sentence. *Dimmick* v. *Tompkins,* 194 U. S. 540, 549; *Demarois* v. *Hudspeth,* 99 F. (2d) 274, 275 (C. C. A. 10), certiorari denied, 305 U. S. 656; *Mosheik* v. *Bates,* 87 F. (2d) 221, 222 (App. D. C.); *Steinberg* v. *Cummings,* 14 F. Supp. 647 (M. D. Pa.), affirmed, 85 F. (2d) 1022 (C. C. A. 3), certiorari denied, 299 U. S. 602; *Smith* v. *Hiatt,* 48 F. Supp. 747, 749 (M. D. Pa.); *Von Baden* v. *Hiatt,* 47 F. Supp. 683 (M. D. Pa.). Petitioner's choice in remaining in the county jail was just as voluntary as if, under the old practice, he had obtained a supersedeas. If he did not wish to have the execution of the judgment stayed after bail had been denied, he could have elected to commence service of his sentence.[10]

Contrary to petitioner's contention (Pet. 4, 12, 17–21), there is no conflict between Rule V and 18 U. S. C. 709a, which provides in part that a sentence commences to run from the time a pris-

[10] The refusal to admit petitioner to bail was undoubtedly proper in view of the policy embodied in Rule V of the Criminal Appeals Rules to restrict bail to cases involving substantial questions. See Brief for the United States in Opposition in *Spalek* v. *United States,* No. 588, this Term, p. 11. In any event, however, it is clear that petitioner cannot collaterally secure a review of such refusal by seeking to obtain credit for the time spent in the county jail after he chose not to enter upon service of his sentence pending appeal.

oner is delivered to a jail to await transportation to a penitentiary. Assuming that the day petitioner spent at the county jail before he filed his notice of appeal was a day during which he was confined to await transportation, and therefore a day served in execution of sentence,[11] the moment that he filed his notice of appeal the execution of his sentence was stayed by virtue of Rule V. He could not thereafter have been transported to the penitentiary until his appeal was terminated unless he filed a notice of election to commence service of his sentence. After his notice of appeal was filed, in the absence of an election to serve his sentence, petitioner's incarceration was not to await transportation to the penitentiary but to await the outcome of the appeal. Cf. *Demarois* v. *Hudspeth, supra.* With respect to credit for the time spent in the county jail, petitioner's situation is the same as if he had been granted release on bail on the day he filed his notice of appeal; he had served one day in execution of his sentence and thereafter the execution was suspended until disposition of the appeal. The purpose of Section 709a was to insure that prisoners would receive credit for the time they might spend awaiting transportation to the penitentiary. *Brown* v. *Johnston,* 91 F. (2d) 370, 372 (C. C. A. 9), certiorari denied, 302 U. S. 728; *Demarvis* v.

[11] We are informed that, administratively, convicted defendants are credited with the time so spent before a notice of appeal is filed.

Hudspeth, supra. That statute does not relate to supersedeas and does not purport to deprive the courts of their power to stay execution of sentences; the power, as we have seen (*supra,* pp. 7–8), existed long prior to the enactment of Section 709a in 1932, and Rule V is merely an exercise of that power pursuant to the enabling act of 1933.[12]

CONCLUSION

Petitioner's contentions are without merit and there is therefore no occasion for this Court to exercise its extraordinary power to grant review before judgment in the circuit court of appeals. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

CHARLES FAHY,
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Assistant Attorney General.
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MARCH 1944.

[12] The fact that, under the old supersedeas procedure, it might have been necessary if execution had commenced, that the writ be directed to the officer holding the execution (see Pet. 28), does not mean that this Court was bound to continue that practice. Under Rule V the filing of a notice of appeal is in itself a sufficient direction. In this case the marshal was informed of the filing of the notice of appeal and, in accordance with Rule V, he did not deliver petitioner to the penitentiary for service of the sentence (see R. 14).

U. S. GOVERNMENT PRINTING OFFICE: 1944

(16)

No. 700.

Supreme Court of the United States

OCTOBER TERM, 1943.

NORMAN G. BAKER, PETITIONER,

VS.

WALTER A. HUNTER, WARDEN, UNITED STATES PENITENTIARY, LEAVENWORTH, KANSAS, RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

REPLY BRIEF OF PETITIONER.

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REPLY BRIEF OF PETITIONER.

Since filing Petitioner's brief in this case, the opinion has been published in *Baker* v. *United States*, (C. C. A. 8) 139 F. 2d, Advance Sheets, page 721. In that case the Court held that Section 709a of Title 18 of the United States Code, had not been repealed by Rule V, but is still the law, but the Court denied the motion to correct the mandate on the ground that the record "does not show that Baker was committed to jail 'to await transportation to the place at which his sentence was to be served.'"

No evidence was introduced on the hearing of the motion.

In the case at bar, it is specifically alleged by the petition in the lower court that the United States Marshal served the commitment in question "by delivering this Petitioner to the Pulaski County Jail at Little Rock, Arkansas, on January 25, 1940, to await transportation to the penitentiary at Leavenworth (Par. 4); that Petitioner commenced the service of his sentence on January 25, 1940, when he was placed in the county jail "to await transportation to the penitentiary at Leavenworth, and service of said sentence continued in said jail and in a jail at Pine Bluff, Arkansas, to and including March 22, 1931 (Par. 5), on which date he was delivered to the Respondent at the federal penitentiary at Leavenworth, Kansas" (Tr. of Rec. p. 6).

There was no denial of the allegations of the petition and these allegations of fact were admitted by the demurrer (Tr. of Rec. p. 17), so no evidence was necessary to establish these facts.

Counsel for Respondent correctly state that Petitioner's right to be released at the present time depends on whether he is entitled to credit for the time he spent in the County Jail from January 25, 1940, when he filed his notice of appeal, to March 15, 1941, when the mandate of the Circuit Court of Appeals was filed in the District Court.

Counsel contend that the filing of Petitioner's notice of appeal resulted in an automatic stay of the execution of his sentence, because Rule V provides that "an appeal from a judgment of conviction stays the execution of the judgment." Counsel say that "Rule V is merely a regulation of the terms and conditions of appeals in criminal cases"; also that the power to stay enforcement of the judgment pending appeal has always been considered part

of an appellate court's traditional equipment for the administration of justice (p. 7).

Counsel overlook that neither the District Court nor the 10th C. C. A. did anything to exercise that traditional power. It is conceded that execution of the judgment was commenced by putting Petitioner in the County Jail on January 25th to await transportation to the penitentiary.

The Court did not recall the commitment.

The Court did not direct the marshal to suspend execution of the commitment.

The Court made no order and issued no commitment to detain Petitioner in the County Jail.

It is not a case where the Court exercised any power to supersede the judgment. The Court did nothing but leave Petitioner in the control of the marshal under the original commitment. It took no action whatever to change Petitioner's status as a prisoner undergoing service of sentence in the County Jail to await transportation to the penitentiary.

Substantive Law.

Counsel for Respondent ignored the vital question of whether Section 709a of Title 18 of the United States Code embraces a matter of substantive law.

Unquestionably the right to liberty is a substantive right.

Unquestionably the right to deprive a person of liberty by imprisonment after conviction for a crime is a substantive matter.

Unquestionably the punishment to be inflicted for a given crime is a substantive matter.

Unquestionably statutory provisions as to what shall constitute the commencement and the end of service of a sentence are likewise matters of substantive law.

As Section 709a of Title 18 specifies particular facts which shall constitute the commencement of service of a sentence, it is necessarily substantive.

So if Rule V repeals 709a or modifies it, Rule V must necessarily be held a matter of substantive law, for any law which repeals or modifies a substantive law must be equally substantive.

Unquestionably there can be no justice in imprisoning a man five years and two months on a four year sentence.

Unquestionably the Constitution forbids double jeopardy, and the whole spirit of American law is against double punishment.

And what is imprisonment, but punishment?

Unquestionably it was the intent of Congress in enacting Section 709a to prevent such double punishment by a substantive law.

Counsel for Respondent refer in argument (p. 9) to Rules 72 and 73 of the Rules of Civil Procedure and state:

> "There can be no question, therefore, that the grant of authority to this Court under the Act of February 24, 1933 (18 U. S. C. 688), to prescribe by rule the conditions on which supersedeas may be allowed involves no unconstitutional delegation of legislative power."

But Counsel fail to note that Rules 72 and 73 apply only when an appeal "is permitted by law," and only "whenever an appellant entitled thereto, desires a stay on appeal." These rules do not purport to "*entitle*" appellant to a stay and throw no light upon whether Section 709a is a matter of substantive law. Furthermore, Title 28, United States Code, Sections 723b and 723c specifically provide that "said rules shall neither abridge, enlarge nor modify the substantive right of any litigant," thus clearly

showing the congressional intent to preclude the Supreme Court from legislating on substantive rights.

Counsel quote (p. 9) from *Bank of the United States v. Halstead*, 10 Wheat. 51-60, that power is vested in the courts to regulate the practice of the courts, but fail to quote the portions of the opinion holding that Congress had a right to regulate proceedings on executions:

> "The right of Congress, therefore, to regulate the proceedings on executions, and direct the mode, and manner, and out of what property of the debtor satisfaction may be obtained, is not to be questioned, * * *" (p. 54).

The court then quoted the specific provisions giving the courts power to issue writs "necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law" (p. 55) and it was said further:

> "It was well known to Congress, that there were in use in the state courts, writs of execution, other than such as were conformable to the usages of the common law. And it is reasonable to conclude that such were intended to be included under the general description of writs agreeable to the principles and usages of law. * * * That it was intended to restrict the power to common law writs of execution sanctioned by the principles and usages of the state laws, is strongly corroborated by the circumstance that the process act, passed a few days thereafter, adopts such as the only writs of execution to be used, * * *" (p. 56).

The court said further:

> "That act, therefore, adopts the effect as well as the form of the state processes" (p. 57);

so that the effect of the writs was determined by Congress itself and not left to legislation by the court.

In *Tinkoff* v. *U. S.*, 86 F. 2d 868, cited by counsel (p. 8), the question in the case at bar did not arise. In that case it was held that supersedeas was a matter of statutory right if the appeal was taken and bond given within sixty days and that the statute fixed the time in which an appeal must be taken if a supersedeas was to be allowed by effect of law or by the court.

In *Steinberg* v. *Cummings*, 14 F. Supp. 647, it was held that the prisoner was not entitled to credit for time spent in detention headquarters because such detention was by order of court made upon his own application. That case does not involve the effect of Section 709a at all.

Counsel argue that Petitioner's failure to elect to serve his sentence in the penitentiary should be given the same effect as a voluntary application for confinement in the county jail instead of in the penitentiary. This suggestion ignores the fact that Petitioner persistently insisted upon his right to be admitted to bail, making five different applications for that purpose, and that his right to release on bail would have been defeated by an election to serve in the penitentiary.[1]

Surely Petitioner is not to be punished because of his persistence in his efforts to obtain release upon bail.

In conclusion, we urge that there is nothing in Rule V which authorizes the marshal to keep a prisoner in confinement pending appeal. The only authority the marshal had to hold Petitioner was the commitment to the penitentiary which the marshal served by putting Petitioner in the county jail to await transportation to the penitentiary.

Under Section 709a of Title 18, Fed. Code Ann., such imprisonment to await transportation, constituted service

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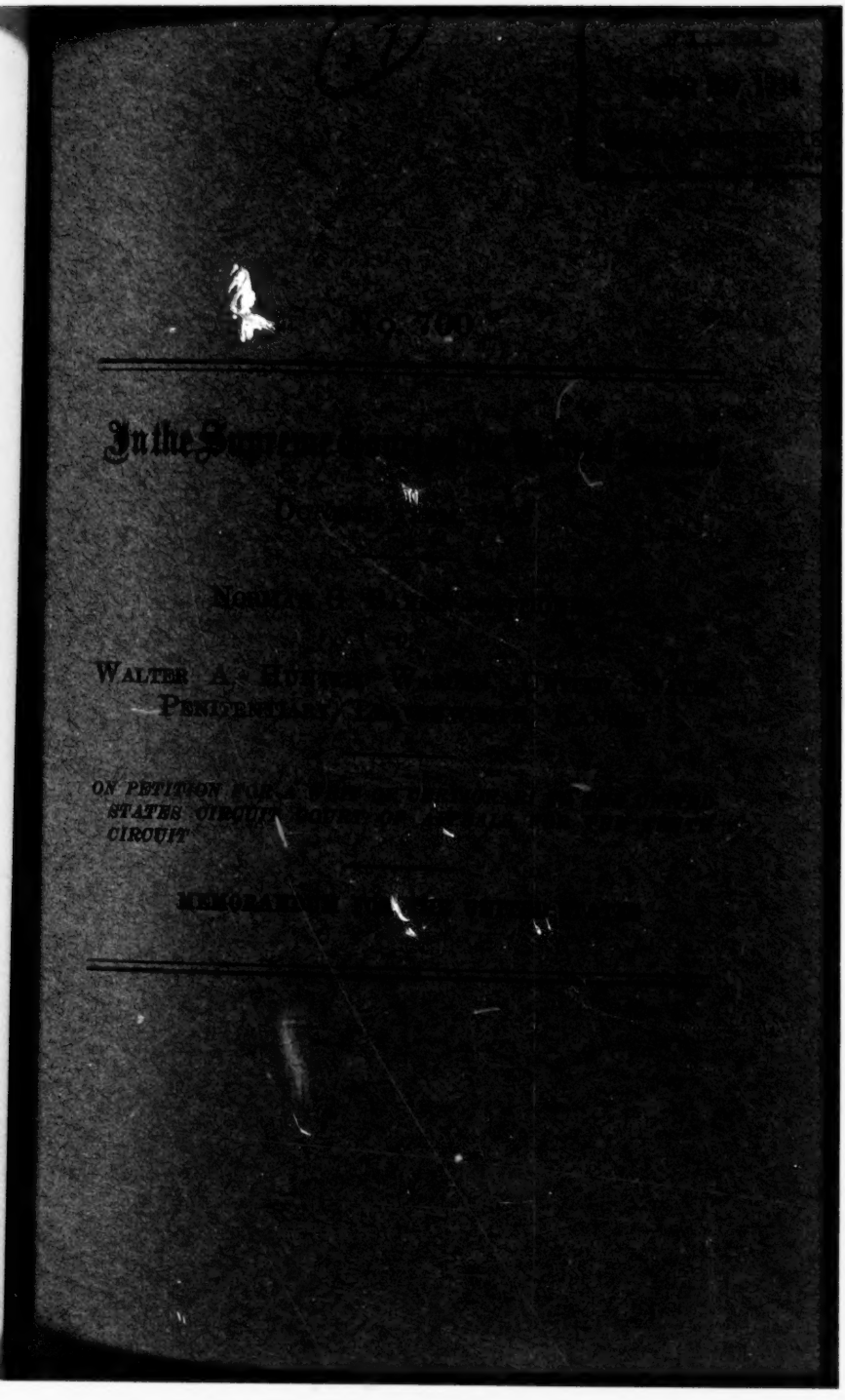
[1]*Holmes* v. *U. S.*, 125 F. 2d 432.

of Petitioner's sentence and having served more than four full years, he is now entitled to release.

Respectfully submitted,

A. G. BUSH,

Counsel for Petitioner.



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MEMORANDUM FOR THE UNITED STATES

Since our brief in opposition to the petition for a writ of certiorari was filed in the above-entitled case, our attention has been called to the decision of the Circuit Court of Appeals for the Eighth Circuit in *Baker* v. *United States,* decided January 8, 1944, reported at 139 F. (2d) 721 (February 28, 1944, issue of the advance sheets). In that decision the circuit court of appeals, which had affirmed petitioner's judgment of conviction (115 F. (2d) 533; see our brief in opposition, p. 4), denied petitioner's application to modify the mandate of that court. In his application petitioner apparently made the same contentions with respect

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to the validity of Rule V of the Criminal Appeals Rules as he makes in his petition for a writ of certiorari before judgment in the Circuit Court of Appeals for the Tenth Circuit filed February 15, 1944. The Circuit Court of Appeals for the Eighth Circuit held that there was no merit in petitioner's contentions.

Respectfully submitted.

CHARLES FAHY,
Solicitor General.

MARCH 1944.

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